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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. MATTHEW WILKE MORGAN, Defendant and Appellant.	C060734 (Super. Ct. No. 07F09437)

Twenty-five-year-old defendant Matthew Wilke Morgan met 12-year-old S.D. in an online chat room. Despite S.D.'s parents' attempts to sever the relationship, defendant continued to communicate with her, ultimately arranging a meeting. An information charged defendant with seven counts of lewd or lascivious acts upon a child under the age of 14 and two counts of lewd acts upon a child 14 or 15 years of age. A jury found defendant guilty of all counts. Sentenced to 15 years 4 months, defendant appeals, contending the court erred in sentencing him. We shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In October 2007 S.D.'s parents contacted police, concerned their daughter was having improper contact with an older man.

Following interviews with S.D. and an investigation, an information charged defendant with seven counts of lewd acts with a child under 14 years of age and two counts of lewd acts with a child 14 or 15 years of age. (Pen. Code, § 288, subds. (a), (c)(1).)[1] A jury trial followed. The following evidence was introduced during trial.

August-September 2006 Incidents (Counts One Through Seven)

S.D. was born in the summer of 1993. In 2005 defendant met S.D. online, and the pair communicated online and by telephone for about two and one-half years. Initially, S.D. told defendant she was 19 years old. A week or two after they met online, defendant told S.D. he loved her. S.D. then told defendant she was 13 years old, although she was actually 12. Defendant told S.D. he was in his twenties and wanted to continue the relationship.

S.D.'s parents discovered the online relationship two months later and warned their daughter to stop communicating with defendant. S.D. told defendant her parents told her he would go to jail if he continued to contact her. Defendant told S.D.'s mother he loved her daughter. S.D.'s mother told defendant if he continued to contact her daughter she would notify the police. However, the relationship continued.

In August 2006 defendant traveled to Sacramento from Costa Mesa to meet 13-year-old S.D. for the first time at the

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[1] All further statutory references are to the Penal Code.

California State Fair. At the fair, they played some games and defendant won S.D. a stuffed animal.

After they left the fair, defendant and S.D. went to defendant's hotel room. The pair kissed and S.D. took off her clothes. Defendant massaged her, touching her back, neck, breasts, buttocks, stomach, and between her legs. Defendant tried to have anal intercourse with S.D. but stopped when she complained about the pain.

Defendant put on a condom and had vaginal intercourse with S.D. S.D. described the pain she experienced as "like swords were cutting her inside." S.D. shed quite a bit of blood because she was a virgin. After defendant ejaculated he put on a new condom and had intercourse again.

Later, after showering, the pair went to bed. Defendant wanted to have intercourse again. He put his fingers in S.D.'s vagina and asked if it still hurt her. S.D. told him it did and that she did not want to have intercourse again. The next day, after going to a movie together, S.D. went home.

September 2007 Incidents (Counts Eight and Nine)

In August 2007 defendant moved to Sacramento to be close to S.D. In September 2007, when S.D. was 14 years old, she met defendant at a Dairy Queen. S.D. went back to defendant's residence and engaged in sexual intercourse. Defendant then orally copulated S.D. for approximately 15 minutes. Defendant put on a condom and they had vaginal intercourse for about one hour. S.D. then orally copulated defendant.

Interviews with S.D.

In October 2007 S.D.'s parents contacted police regarding their daughter's relationship with defendant. Officers Michael Hight and Mark Purkeypile interviewed S.D., who denied any sex acts occurred between her and defendant. After the officers told her defendant had told them everything, S.D. told Officer Purkeypile that defendant had been her boyfriend for two and one-half years, that she loved him, and that she had told a friend about having sex with defendant. S.D. later testified she lied to the officer because she thought that was what he wanted to hear.

S.D.'s parents told the police that defendant was on his way to their home. The police contacted defendant about a block away and arrested him.

On January 15, 2008, Detective Erika Woolson interviewed S.D., who was not completely cooperative. S.D. admitted defendant was her boyfriend, and that they had met in an online chat room. S.D. initially lied about her age. According to S.D., the only problem was their age difference. S.D. told the detective she used the cell phones of friends to send defendant text messages.

S.D. admitted she and defendant had sexual intercourse after they met at the state fair. However, she told the detective she lied about having intercourse at defendant's house in September 2007. S.D. never mentioned having sexual intercourse with anyone else during her relationship with defendant.

Officers searched defendant's residence and recovered two digital cameras, three computer towers, a computer memory stick, and a condom. Detectives recovered some photographic images from defendant's cell phone, his computer, and one of his cameras. Detectives also recovered e-mails between defendant and S.D.

On March 6, 2008, an investigator interviewed S.D. in the presence of a deputy district attorney and a victim witness advocate. S.D. told the investigator she lied during her 2007 interview. Defendant and S.D. only talked sexually over the Internet, and she and defendant held hands and hugged, but they never kissed in an intimate way.

S.D.'s Testimony

S.D. testified at trial that she could not remember many of the details of her prior statements to police. S.D. testified she and defendant attended the state fair, but after leaving the fair she went to the house of a friend, whose name she could not remember. She lied when she told police that she and defendant went to a motel room.

After defendant moved to Sacramento, S.D. would meet him at the Dairy Queen. She had been to defendant's house once or twice, but did not remember telling detectives that she had taken off her clothes and kissed defendant. S.D. also did not remember telling detectives that defendant performed oral sex on her or that they had sexual intercourse.

S.D. testified that she was showing off when she told a friend she had sexual intercourse with defendant. S.D. could

not remember whom she told, but it might have been A.A. A.A. testified at trial that S.D. called defendant her boyfriend, and bragged about having sex and taking naked pictures for him. S.D. testified she and defendant told each other that they were in love.

S.D. claimed the sexually explicit photographs recovered from defendant's camera were taken by Jeremy "McEntee" in August 2006. She testified she had sexual intercourse in the hotel with Jeremy, not defendant. Jeremy contacted her through a friend and wanted to apologize for assaulting her the previous year. S.D. went to the hotel to meet Jeremy out of fear. After going into a room at the hotel, they watched television and drank alcohol before having sex. The next morning Jeremy told S.D. he had taken photographs of her and threatened to post them on the Internet. While Jeremy showered, S.D. took the camera and left. She later gave the camera to defendant. She never told anyone about the incident.

Jeremy Jennings sexually assaulted S.D. in September 2005. He pled no contest to a violation of section 288, subdivision (a), was sentenced, and went into custody. Jennings died in an accident prior to trial in this matter. S.D. was apparently referring to Jeremy Jennings when she referred to Jeremy McEntee.

Verdict and Sentencing

The jury found defendant guilty of all counts. The court sentenced defendant to 15 years 4 months, as follows: for count four, the upper term of eight years; for counts five, six, and

seven, a consecutive two years each; for counts eight and nine, a consecutive eight months each. The court imposed concurrent terms of six years each for counts one, two, and three. Defendant filed a timely notice of appeal.

DISCUSSION

I.

Defendant contends the trial court violated his right to due process in sentencing him to the upper term on the basis of the court's determination that defendant's suborning of S.D.'s perjury at trial was an "'incredibly, incredibly aggravating' factor." In the alternative, defendant argues trial counsel's failure to object constituted ineffective assistance.

Background

Prior to imposing sentence, the trial court discussed the case. The court noted S.D.'s parents discovered the relationship with defendant and warned him not to have any further contact with their daughter. In addition, the court pointed out that defendant told S.D. he loved her within a week or so of meeting her online. The court described this as an "avalanche of overwhelming affection" that left S.D. "perfectly poised to become a victim in this case."

The court also noted that at their first meeting, defendant and S.D. spent the day at the state fair, after which they returned to defendant's hotel room. Defendant "engage[d] her in every conceivable sexual activity including an attempted sodomy" before photographing intimate areas of S.D.'s body. According to the court, the photographs revealed an embarrassed 13 year

old. The subsequent viewing of these photos by officers, attorneys, and the jury further victimized S.D.

The court also considered it significant that defendant admitted to the probation officer that he had committed these crimes. The court reviewed S.D.'s testimony in which she denied the acts defendant admitted he committed. Instead, S.D. blamed Jeremy and stated she took the camera and gave it to defendant. The court commented: "In my view, [S.D.] in no way begins to possess the sophistication or the maturity to create such a story. [¶] I have no problem surmising that the entire scheme of that story was concocted and foisted upon her by you with her full agreement, I'm sure. In other words, I have no doubt that you encouraged and facilitated [S.D.] once again to commit multiple acts of perjury right next to me. I watched her do it, and you watched her do it, and you knew she was lying. And you still let her do it. [¶] The sole purpose of that was in some again misguided hope to fool these twelve citizens who took time out of their lives to come and hear this case so you could hopefully walk away from this. [¶] If it weren't enough for you to victimize this young person sexually, exploiting her obvious immaturity, exploiting her through photographs, you, in my view, completely revictimized her again with her clumsy efforts to lie as if that were a small thing, and, in fact, subjecting her to her own potential criminal liability for all that perjury. You did that. You knew it had happened to you. You knew you did these things with her, and you still let her

lie. And you probably set her up with the story. That is incredibly, incredibly aggravating in my view."

For all these reasons, the trial court found true three aggravating factors: the victim was particularly vulnerable, defendant induced the minor to commit additional crimes, and defendant was convicted of crimes for which consecutive sentences could have been imposed but for which concurrent sentences were being imposed. The court found defendant's lack of a prior criminal record to be a factor in mitigation.

In finding defendant not eligible for probation the court commented: "[Y]ou did, in my view, obviously induce this minor to commit additional crimes. She perjured herself on multiple occasions. In fact, I'm not sure that there was much that came out of her mouth during this trial that resembled the truth. I have no doubt that that was at your instigation. You could have stopped it. You could have admitted your guilt long ago."

In selecting the upper term for count four, the trial court found "the factors in aggravation far outweigh the factors in mitigation, and particularly now since the defendant has admitted that these offenses are true. He schemed and let this young woman attempt to lie for him repeatedly. That is incredibly aggravating in my view." Defense counsel made no objection during the sentencing.

Discussion

Defendant asserts the trial court erred in sentencing him to the upper term based on the court's belief that defendant was guilty of suborning S.D.'s perjury at trial. Defendant

acknowledges defense counsel failed to object at trial, but argues this failure to object constitutes ineffective assistance of counsel.

To prevail on a claim of ineffective assistance of counsel, defendant must show that trial counsel's representation fell below an objective standard of reasonableness, and there is a reasonable probability that but for counsel's deficient performance the result at trial would have been different. (*People v. Ledesma* (1987) 43 Cal.3d 171, 216-218.) Defendant must satisfy both components. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1126.) Defense counsel has no duty to make futile objections. (*People v. Anderson* (2001) 25 Cal.4th 543, 587.)

Defendant focuses primarily on the court's statements about defendant's connection with S.D.'s perjured testimony at trial. According to defendant, the court erred in not making on-the-record findings to support a finding of perjury.

In support, defendant relies on *People v. Howard* (1993) 17 Cal.App.4th 999. *Howard* held that a court, when imposing an aggravated sentence because of perjury at trial, is required to make on-the-record findings encompassing all the elements of a perjury violation. (*Id.* at p. 1004.) The court reasoned: "[A]n aggravated sentence should not be imposed routinely simply because the jury, by convicting the defendant, obviously did not accept his or her testimony. . . . Requiring the trial court to make findings as to the elements of perjury will assure that the imposition of an aggravated sentence because of perjury will be

restricted to those cases where perjury has clearly been committed." (*Id.* at p. 1005.) A failure to set forth the elements is reviewable under the harmless beyond a reasonable doubt standard of review. (*Id.* at pp. 1004-1005.)

Although the trial court in the present case stated defendant "probably set [S.D.] up with the story" and considered this an "incredibly, incredibly aggravating" factor, the court did not set forth the evidence supporting a perjury charge against defendant. (§ 127.) Defendant contends defense counsel performed ineffectively in failing to object to this omission.

We disagree. In sentencing defendant to the upper term, the trial court cited three factors in aggravation: the vulnerability of the victim, defendant's having been convicted of other crimes for which consecutive sentences could have been imposed, and defendant's inducement of S.D.'s perjury.

A court's imposition of the upper term "does not infringe upon the defendant's constitutional right to jury trial so long as one legally sufficient aggravating circumstance has been found to exist by the jury, has been admitted by the defendant, or is justified based upon the defendant's record of prior convictions." (*People v. Black* (2007) 41 Cal.4th 799, 816 (*Black*).) Here, in addition to the perjury factor, the court relied on two other factors, factors defendant argues are not legally sufficient to support the upper term.

Defendant contends S.D. was not particularly vulnerable. The court characterized S.D. as particularly vulnerable, "demonstrated by the fact that within one week or so of you

meeting her she became totally enamored with a complete stranger upon your instant declaration of love to her. [¶] Furthermore, you were aware, and I believe you used the knowledge of her prior molest against her. You were aware of that, and yet you proceeded to victimize her again."

Defendant argues this characterization of his relationship with S.D. ignores the "inconvenient truth that appellant and [S.D.] were in love." Defendant goes on to present a litany of historic or famous relationships between teenage girls and older men, presumably arguing that despite the lack of social acceptance for these relationships, they can endure.[2]

Defendant also argues S.D.'s mother "appeared to accept" that his relationship with S.D. endured. However, S.D.'s mother stated: "[I]t would be my wish if it was possible, that [defendant] have no further contact with [S.D.] until she is eighteen years of age at which time what she chooses to do is her choice and out of my hands." These are the words of a mother who despairs for her daughter's immature choices, not a mother who "accepts" the relationship.

According to defendant, "If being in love makes one 'particularly vulnerable,' it is certainly not the type of vulnerability that would ever be considered an aggravating

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[2] Among the relationships defendant touts are Abelard and Heloise, which resulted in Abelard's castration and Heloise becoming a nun, and Charlie Chaplin and Lita Grey, which resulted in a bitter divorce that nearly destroyed Chaplin's career. (http://en.wikipedia.org/wiki/Helo%C3%AFse_(abbess), http://en.wikipedia.org/wiki/Charlie_Chaplin.)

factor in a criminal case." S.D. was not particularly vulnerable because she was "in love." S.D.'s vulnerability stemmed from being a 13-year-old victim of a prior molestation, preyed upon by an older man, who at their first meeting won her a stuffed animal at the fair and then took her to his hotel room for a variety of sexual acts, some quite painful, culminating in intimate photographs of the young girl. The inconvenient truth, clearly expressed in our laws, that defendant chooses to ignore is that 13-year-old girls, no matter their seeming maturity, are not acceptable sexual objects for grown men, no matter their immaturity. Love can be a many-splendored thing, but the love of an adolescent toward an adult does not sanctify the relationship or make attempted anal intercourse and other sexual acts any less reprehensible.

When a trial court properly finds one aggravating circumstance in accordance with *Cunningham v. California* (2007) 549 U.S. 270 [166 L.Ed.2d 856], a defendant becomes eligible for an upper-term sentence. As a result, any additional fact-finding engaged in by the trial court in selecting the appropriate sentence does not violate the defendant's right to a jury trial. (*Black*, *supra*, 41 Cal.4th at p. 812.) Here, the trial court properly found S.D.'s vulnerability an aggravating factor. There is no reason to believe the trial court would have imposed lesser punishment had it not cited to the additional aggravating factor of suborning perjury. Therefore, defense counsel's failure to object to the perjury factor would not have changed the result.

In a related argument, defendant contends the trial court imposed the upper term because he exercised his constitutional right to trial. In support, defendant quotes several statements made by the trial court during sentencing. In discussing S.D.'s perjury, the trial court stated: "You could have stopped it. You could have admitted your guilt long ago." The court noted that according to the probation officer, "you admitted your guilt which would have been a good thing had you done that long ago and well before this trial started."

Contrary to defendant's assertion, the trial court did not impose the upper term because defendant exercised his right to trial. The comments, when considered in context, related to one of the stated reasons for imposing the upper term, S.D.'s perjury, which the trial court believed defendant participated in. As previously noted, disregarding the reference to perjury, the trial court cited ample reasons to impose the upper term.

II.

Defendant argues the trial court abused its discretion and violated his due process rights by failing to consider the criteria affecting probation under California Rules of Court, rule 4.414;[3] failing to order a section 288.1 report; and by imposing consecutive sentences. Again, defendant contends defense counsel's failure to object amounted to ineffective assistance of counsel.

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[3] All further references to rules are to the California Rules of Court.

Rule 4.414 Factors

According to defendant, the court failed to consider any of the proper criteria in rule 4.414 affecting and supporting probation. Several facts relating to the crime, defendant asserts, support a grant of probation. Instead, the court abused its discretion by relying on unfounded and speculative assumptions in denying probation.

At sentencing, the trial court stated defendant was eligible for probation, but probation was not warranted because of the nature, seriousness, and circumstances of the offense. With regard to consecutive sentencing, the court cited rule 4.425, subdivision (a)(2), finding the crimes involved separate acts of violence, and therefore consecutive sentences were appropriate.[4]

The trial court possesses broad discretion in determining whether or not to grant probation. We will not disturb that discretion except on a showing that the court exercised this discretion in an arbitrary or capricious manner. A court abuses its discretion when its determination exceeds the bounds of reason. (*People v. Downey* (2000) 82 Cal.App.4th 899, 909-910; *People v. Lai* (2006) 138 Cal.App.4th 1227, 1256-1257.)

Here, the trial court stated it had received and reviewed the probation officer's report. The court also considered the

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[4] The court sentenced defendant to 15 years 4 months. The probation report recommended six years -- the midterm of six years for count one and the remaining counts to be sentenced concurrently.

sentencing briefs, statements in mitigation, and statements in aggravation. In addition, the court heard arguments from counsel as well as statements by S.D.'s mother, the victim advocate, and defendant. After considering all this information, the court denied probation because of the nature, seriousness, and circumstances of the offense.

The court must state its reasons for sentencing on the record at the time of sentencing. (§ 1170, subd. (c).) The court need not expressly state its consideration of each factor, and the court will be deemed to have considered those factors unless the record reveals otherwise. (Rule 4.409.) Defendant argues the trial court failed to consider *any* of the proper criteria in rule 4.414, denying defendant due process.

Defendant is mistaken. Rule 4.414, factor (a)(1) allows the court to consider "Facts relating to the crime, includ[ing]: [¶] . . . The nature, seriousness, and circumstances of the crime as compared to other instances of the same crime." The court cited these factors in denying defendant probation. We find no abuse of discretion.

Section 288.1 Report

Defendant contends the trial court abused its discretion in failing to order a psychological evaluation pursuant to sections 288.1 and 1203.067. According to defendant, by failing to obtain a report the trial court improperly usurped the role of psychiatrist.

A court considering a probation request from a defendant convicted of a felony listed in section 1203.067 must first

review the criteria affecting the grant or denial of probation set forth in rule 4.414. The court considers those factors and determines whether to deny probation or consider further the possibility of granting probation. If the court decides to deny probation based on the factors set forth in rule 4.414, a diagnostic evaluation is not required. (*People v. Ramirez* (2006) 143 Cal.App.4th 1512, 1532.)

Here, the court determined defendant was ineligible for probation under rule 4.414, factor (a)(1). This determination vitiated the need for a diagnostic evaluation.

Consecutive Sentences

Defendant also argues the court abused its discretion in imposing consecutive one-third the midterm sentences for counts five, six, seven, eight, and nine. We disagree.

Section 669 grants the trial court wide discretion to impose consecutive sentences when a defendant is convicted of two or more crimes. (*People v. Shaw* (2004) 122 Cal.App.4th 453, 458.) A trial court may impose consecutive sentences for crimes involving separate acts of violence. (Rule 4.425(a)(2).)

In sentencing defendant, the trial court stated the crimes involved separate acts of violence. Despite defendant's attempts to characterize the sexual acts as "the antithesis of a violent sexual assault" because of their "consensual" nature, the evidence supports the court's conclusion.

During their first encounter, defendant exploited S.D.'s immaturity and infatuation with him by telling her he loved her. After spending time enjoying the fair, defendant took S.D. back

to his hotel room and engaged in numerous sexual acts, including attempted sodomy, which caused S.D. pain. S.D. told police that intercourse felt like "swords were cutting her inside." She bled profusely because she was a virgin. Defendant took explicit photographs of S.D. engaged in a variety of sexual acts. Subsequently, defendant moved to Sacramento and continued to exploit S.D.'s infatuation to persuade her to engage in sexual intercourse and oral copulation.

Defendant's willingness to repeatedly violate an immature young girl who had been previously molested justified the trial court's conclusion that his crimes involved separate acts of violence warranting consecutive sentencing. Victimizing a vulnerable 13 year old is neither "consensual" sex nor love.

III.

Defendant contends the trial court's imposition of the upper term in count four violated his constitutional right to be free from ex post facto laws and his right to due process because he committed the crime before March 30, 2007, the effective date of Senate Bill No. 40, which amended section 1170, subdivision (b). (Stats. 2007, ch. 3, § 2.) The ex post facto clause prohibits only those laws that retroactively alter the definition of crimes or increase the punishment for criminal acts. (*Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1170-1171.)

If we assume that application of Senate Bill No. 40 to defendant's trial is barred by ex post facto principles, the result would be to require application of the sentencing

requirements of section 1170, subdivision (b) as reformed by the Supreme Court in *People v. Sandoval* (2007) 41 Cal.4th 825, 843-852 (*Sandoval*). In effect, the trial court would conduct the same analysis it has already performed, to the same effect. Remand for resentencing would be a futile act.[5]

DISPOSITION

The judgment is affirmed.

RAYE, J.

We concur:

SCOTLAND, P. J.

SIMS, J.

[5] We also reject defendant's argument that his sentencing under *Sandoval* violates his Sixth Amendment right to a jury trial. We are required to follow *Sandoval* (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455), as defendant acknowledges.